United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

381A

BRIEF FOR THE APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,766

GEORGE DANIELS,

Petitioner-Appellant,

v.

MELVIN R. LAIRD, et al.,

Respondents-Appellees

On Appeal from the United States District Court
for the District of Columbia

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TABLE OF CONTENTS

CASES AND AUTHORITIES CITED

Cases

---

* Cases Chiefly Relied On

---

* Cases Chiefly Relied On

Statutes, Rules, and Regulations

---

* Cases Chiefly Relied On

Books and Articles

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,766

GEORGE DANIELS
Petitioner-Appellant

v.

MELVIN R. LAIRD
Secretary of Defense

and

JOHN H. CHAFEE
Secretary of the Department
of the Navy

and

COMMANDANT
First Naval District
Boston, Massachusetts

and

COMMANDING OFFICER
U.S. Naval Disciplinary Command
Portsmouth, New Hampshire

Respondents-Appellees

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE APPELLANT

QUESTIONS PRESENTED

1. Does the District Court below have jurisdiction over a habeas corpus petition filed by a serviceman imprisoned outside of the District of Columbia when (a) the balance of conveniences, as measured by the substantial contacts with or interests in the case, strongly favors the District of Columbia, (b) when the serviceman's release from prison is imminent and certain, and (c) when his ultimate custodians reside within the District of Columbia?

2. When a court-martial conviction results in disabilities and burdens which continue after incarceration, does a District Court retain habeas corpus jurisdiction to consider a collateral attack on that conviction after the petitioning serviceman has been released from military custody?

3. Is the District Court for the District of Columbia a proper forum in which to sue the Secretary of Defense in an action brought by a discharged serviceman seeking declaratory, injunctive and mandamus relief consisting of back-pay, proper rank, and the expunging of a court-martial conviction rendered against him in violation of his constitutional rights?

This case has not previously been before this Court.

REFERENCE TO RULINGS

The court below filed no opinion and made no findings of fact or conclusions of law.

STATEMENT OF THE CASE

Petitioner-Appellant George Daniels appeals from an order of the United States District Court for the District of Columbia on September 2, 1970, denying Daniels' Petition for a Writ of Habeas Corpus and dismissing his Complaint for Declaratory Judgment, Permanent Injunction, and Mandamus, and from an order of the same court on September 22, 1970, denying Daniels' Motion for Clarification and Reconsideration.

In July 1966 Daniels enlisted for a four-year tour of duty in the United States Marine Corps. On December 7, 1967, a general courtmartial at Camp Pendleton, California, convicted him for having violated Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, by committing acts proscribed by 18 U.S.C. § 2387(a).* The charges were based primarily on Daniels'

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* § 2387(a): "Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:

(1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

(2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States -

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

statements made to other black marines on July 27, 1967, in a short "bull session" during the noon meal to the effect that Vietnam is a white man's war, that black men should not have to fight there when there was a struggle for civil rights in this country, and that the marines should request an interview with their commander to tell him of their views.

Daniels was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, reduction to grade E-1, and confinement at hard labor for 10 years. On May 15, 1969, the Navy Board of Review affirmed the conviction, but reduced the confinement to 4 years. On July 10, 1970, the Court of Military appeals reversed the conviction on all specifications because the law officer had failed to instruct the courtmartial that Daniels' statements must have had a natural tendency under the circumstances to cause insubordination, disloyalty, or refusal of duty. However, it affirmed a conviction for the lesser included offense of soliciting a member of the Marine Corps to commit the offense of refusing to perform a military obligation.

On August 13, 1970, after he had been incarcerated for more than two years and while he was imprisoned in the Naval Disciplinary Barracks at Portsmouth, New Hampshire, Daniels filed in the court below the Petition and Complaint which are the subject of this appeal. That Petition and Complaint seeks an order setting aside Daniels' solicitation conviction and restoring Daniels to the rank and pay scale he would have had

absent the conviction, together with back pay, on the ground that Daniels was tried and convicted in violation of his constitutional rights under the First Amendment and the Due Process Clause of the Fifth Amendment.

The petition and Complaint were not filed in the District Court for the District of New Hampshire, because the balance of convenience, as measured by substantial contacts, was strongly in favor of the court below. Furthermore, Daniels' release from Portsmouth was imminent and certain at the time the Petition and Complaint was filed, for Daniels had already served more time in prison than the maximum sentence possible for the lesser included solicitation offense. On August 18, 1970, the Court of Military Review affirmed a four-month prison term for Daniels, a term which he had long since served. */ On August 20, 1970, Daniels was released from prison and given a General Discharge from the Marine Corps.

In response to the show cause order issued by the court below, the Government moved to dismiss Daniels' Petition and deny his Complaint on the grounds that the court was without jurisdiction since Daniels was not incarcerated in the District of Columbia and in any event had by then been released. On September 2, 1970, the court below dismissed Daniels' Petition for a Writ of Habeas Corpus without mentioning Daniels' Complaint for Declaratory Judgment, Permanent Injunction, and Mandamus. Daniels filed a Motion asking the court

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*/ Although the Court of Military Appeals had ruled that Daniels was guilty only of solicitation, it does not have the power to alter or reduce sentences. Daniels' case had to be remanded to the Court of Military Review for correction of the judgment against him, a procedure which resulted in Daniels spending another month and a half in prison beyond the maximum possible

below to recall its order of September 2 so that Daniels might respond to the contentions of the Government and further seeking clarification as to the effect of the September 2 order upon the Complaint.

On September 22, 1970, and without a hearing or opinion, the court below denied Daniels' Motion for Clarification and Reconsideration. Daniels filed a Notice of Appeal on October 7, 1970, the record was docketed in this court on November 11, 1970, and on December 17, 1970, Chief Judge Bazelon extended the time for filing this brief until January 11, 1970. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1291.

SUMMARY OF ARGUMENT

I. The court below has jurisdiction of Daniels' habeas corpus Petition because he was in a military prison when it was filed, it raises substantial constitutional objections to Daniels' court-martial conviction, and personal jurisdiction was established over Appellees Laird and Chafee, the ultimate custodians of Daniels. Ahrens v. Clark, 335 U.S. 188 (1948), did not lay down a strict jurisdictional rule requiring the physical presence of a habeas corpus petitioner within the territorial jurisdiction of the forum court, and, in any event, subsequent decisions have eroded the authority of

Ahrens. The District of Columbia is the proper forum because no other jurisdiction has any substantial interest in the action and the balance of conveniences weighs heavily in favor of the District of Columbia. Under Carafas v. LaVallee, 391 U.S. 234 (1968), the court below did not lose habeas corpus jurisdiction when Daniels was released from custody and discharged from the armed services, because he continues to suffer from disabilities and burdens caused by his court-martial conviction.

II. Regardless of whether the court below erred in denying Daniels' Petition for a Writ of Habeas Corpus, it clearly erred in dismissing Daniels' Complaint for Declaratory Judgement, Permanent Injunction, and Mandamus, for it has subject-matter jurisdiction of the action notwithstanding Daniels' release from custody, personal jurisdiction over Appellees Laird and Chafee, and the District of Columbia is the proper venue. Kauffman v. Secretary of the Air Force, 135 U.S. App. D.C. 1 , 415 F.2d 991 (D.C. Cir. 1969), cert. denied 396 U.S. 1013 (1970).

ARGUMENT

I. THE COURT BELOW IMPROPERLY DISMISSED DANIELS' PETITION FOR A WRIT OF HABEAS CORPUS

A. The Daniels' Petition Satisfies the General Requirements for Invoking Habeas Corpus Jurisdiction to Review Court-Martial Convictions Collaterally.

Once military appellate review remedies have been exhausted, the federal district courts are empowered by way of writ of habeas corpus to review the constitutionality of court-martial convictions rendered without jurisdiction or in violation of constitutionally protected rights. Ex parte Milligan, 4 Wall. (71 U.S.) 2 (1886); Ex parte Reed, 100 U.S. 13 (1879); Burns v. Wilson, 346 U.S. 137 (1953). See generally SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS 42-44 (1969); Developments in the Law - Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1208-1238 (1970). In considering such collateral attacks, the district courts have the same latitude and responsibility to correct jurisdictional and constitutional defects as they have in habeas corpus review of state convictions. Kauffman v. Secretary of the Air Force, 135 U.S. App. D.C. 1 , 415 F.2d 991, 996-997 (D.C. Cir. 1969), cert. denied 396 U.S. 1013 (1970). */

*/Other courts review collateral attacks more narrowly. Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968); Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969). The Supreme Court's failure to endorse this restricted rule in United States v. Augenblick, 393 U.S. 348 (1969), however, probably indicates its tacit agreement with the Kauffman standard. Everett, Collateral Attack on Court-Martial Convictions, 11 AIR FORCE JAG LAW REV. 399, 411 (1969).

It is clear that the Petition filed by Daniels below meets the general requirements for invoking the District Court's habeas corpus jurisdiction. When he filed his Petition, Daniels was incarcerated in a military prison as the result of a court-martial conviction. Appellees Laird and Chafee, the Secretary of Defense and the Secretary of the Navy respectively, were Daniels' ultimate custodians and officially reside in the District of Columbia. In addition, the Daniels' Petition raises substantial questions with respect to the constitutionality of his court-martial conviction. Daniels contends that he was convicted in violation of his right to freedom of speech under the First Amendment, for in its entirety his "offense" consisted of nothing more than communicating his general and abstract political beliefs to other servicemen in circumstances devoid of any clear and present danger of substantive evils which the Marine Corps could lawfully proscribe. Daniels further contends that his right to notice under the Due Process clause of the Fifth Amendment was violated when the Court of Military Appeals held him convicted of a so-called "lesser included offense" with which he was never charged and of which he never had actual or adequate notice. Finally, Daniels contends that his conviction for this supposed offense violates the Due Process Clause because the evidence sustaining his conviction was constitutionally insufficient.

B. The District Court Below Has Jurisdiction Over Daniels' Habeas Corpus Petition Even Though He Was Incarcerated In New Hampshire Because The Balance of Conveniences Strongly Favors the District of Columbia and Because His Release Was Certain and Imminent.

1. The Territorial Presence Doctrine of Ahrens v. Clark.

The only arguable jurisdictional defect in the Petition filed in the court below is that Daniels was incarcerated at the time in New Hampshire rather than in the District of Columbia. In Ahrens v. Clark, 335 U.S. 188 (1948), it was held that the District Court for the District of Columbia was without power to act upon a petition for habeas corpus filed by German nationals being held for deportation on Ellis Island, New York. The Supreme Court ruled that the phrase "within their respective jurisdictions,"*/ prevented the District Court from acting when the petitioners were in custody within a different district.

Although grounded on an interpretation of the habeas corpus statute, the decision in Ahrens was not required by the statute's language, by history, or by precedent. See Justice Rutledge's dissenting opinion and Note, Developments in the Law - Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1162 (1970). In assessing the putative rule of Ahrens, it

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*/ 28 U.S.C. § 2241(a): "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

is important to note that in Ahrens the Supreme Court reaffirmed Ex Parte Endo, 323 U.S. 283, 306 (1944), where it had ruled that a District Court does not lose habeas corpus jurisdiction when a petitioner is transferred beyond its territorial limits. 335 U.S. at 193. Additionally, the Ahrens Court specifically left open the question whether a person confined in an area not subject to the jurisdiction of any District Court may seek habeas corpus, a question which would have been foreclosed if physical presence were invariably a prerequisite to habeas corpus jurisdiction. Id. at 192, n. 4.

Equally important in assessing Ahrens is the fact that the policy reasons given in support of that decision reach only some habeas corpus cases:

> It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose. These are matters of policy which counsel us to construe the jurisdictional provision of the statute in the conventional sense . . . . [335 U.S. at 191.]

The danger of escape and the costs and burdens of transporting prisoners are clearly considerations which are relevant only when it is necessary for them to appear before

the court. If the rule of Ahrens is limited to the reasons which gave rise to it, it will be inapplicable to situations such as the present, where it is wholly unnecessary for the petitioner to be present at the hearing on the petition.

Finally, Mr. Justice Douglas, the author of the Ahrens opinion, subsequently made it clear that the Ahrens rule was not "jurisdictional" in any hard-and-fast sense:

> It is now argued that no District Court can act in these cases because if in one case their jurisdiction under the habeas corpus statute is limited to inquiries into the causes of restraints of liberty of those confined within the territorial jurisdictions of those courts, it is so limited in any other. That result, however, does not follow. In Ahrens v. Clark, supra, we were dealing with the distribution of judicial power among the several District Courts. There was an explicit legislative history, indicating disapproval of a practice of moving prisoners from one district to another in order to grant them the hearings to which they are entitled . . . . It has never been deemed essential that the prisoner in every case be within the territorial limits of the district where he seeks relief by way of habeas corpus. . . . The allocation of jurisdiction among the District Courts, recognized in Ahrens v. Clark, is a problem of judicial administration, not a method of contracting the authority of the courts so as to delimit their power to issue the historic writ. [Hirota v. General of the Army, Douglas MacArthur, 338 U.S. 197, 200-201 (1949).]

Obviously, a rule relating to judicial administration and the proper distribution of burdens among the federal courts is more in the nature of a rule of venue than of

jurisdiction. And, the re-emphasis upon difficulties caused by the transportation of prisoners underscores the narrow policy base upon which the Ahrens rule rests.

2. Subsequent Developments and the Balance of Conveniences Test.

In the period since the Ahrens decision, there has been a steady erosion of the territorial theory of habeas corpus -- the doctrine that the presence of the petitioner is an absolute prerequisite to the exercise of the habeas corpus jurisdiction. For instance, despite Ahrens it has been established that the District Court for the District of Columbia is the proper forum for habeas corpus actions brought by petitioners who are outside the territorial limits of the United States. E.g. Burns v. Wilson, 346 U.S. 137 (1953); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). Furthermore, although the phrase "within their respective jurisdictions" would seem on the face of 28 U.S.C. § 2241 to apply equally to all habeas corpus writs, the Supreme Court ruled in Carbo v. United States, 364 U.S. 611 (1961), that there were no territorial

limitations on the availability of habeas corpus ad prosequendum.*/

The impossibility of confining the writ of habeas corpus within mechanical formulas is demonstrated by Jones v. Cunningham, 371 U.S. 236 (1963), where the Supreme Court held that a paroled prisoner was sufficiently in "custody" to be entitled to invoke habeas corpus jurisdiction.**/ Then, in Peyton v. Rowe, 391 U.S. 54 (1968), the so-called "prematurity" doctrine of McNally v. Hill, 293 U.S. 131 (1934), was overruled. Under McNally, a prisoner incarcerated under one of two consecutive sentences was not entitled to habeas corpus as to the second, for,

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*/ In Carbo the Court reserved judgment as to whether there are territorial limits upon the writ of habeas corpus ad testificandum. 364 U.S. at 618, n. 13. But the Supreme Court's subsequent citation of United States v. McGaha, 205 F. Supp. 949 (E.D. Tenn. 1962), in Barber v. Page, 390 U.S. 719, 724 (1968), suggests that the remaining doubts about the reach of this writ are insubstantial. See Word v. North Carolina, 406 F.2d 352, 356, n. 5 (4th Cir. 1969). It seems anomalous that there are no territorial barriers for habeas corpus ad prosequendum and probably none for habeas corpus testificandum, when these writs necessarily raise the policy problems which motivated the territorial restriction imposed in Ahrens. By contrast, the Great Writ -- the writ habeas corpus ad subjiciendum -- frequently does not require that the prisoner be produced or transported.

**/ In reaching this result, the Supreme Court emphasized that the writ of habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose, the protection of individuals against the erosion of their rights to be free of restraints upon their liberty." 371 U.S. at 243.

strictly speaking, he was not in custody as to the second. In Peyton the Supreme Court rejected such a narrow approach, holding that a prisoner may use the writ of habeas corpus to attack the second of two consecutive sentences while still serving the first. Peyton casts serious doubt upon the territorial theory of Ahrens, for it would be manifestly unjust to permit a prisoner serving one sentence to challenge a subsequent one outstanding against him in the same state, but not one outstanding against him in a different state.

In Word v. North Carolina, 406 F.2d, 352 (1969), Chief Judge Haynsworth, speaking for the Fourth Circuit Court of Appeals sitting en banc, concluded that the Ahrens doctrine had been so eroded by subsequent developments that it no longer precluded a prisoner incarcerated in one state from petitioning the courts of a second state in connection with a conviction outstanding against him in the second state. He stated that "subsequent cases have made it plain that physical presence of the prisoner within the district is not an invariable prerequisite." */ 406 F.2d 358. Judge Haynsworth summarized the present state of the law in these terms:

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*/ See also D. Meador, Habeas Corpus and Magna Carta, 42 (U. Va. Press 1966): ". . . all that is required for effective issuance of the writ is that such a custodian be within the power of the court. It is immaterial where the prisoner is actually confined."

> From all these cases it now seems clear that if the words "within their respective jurisdictions" in § 2241 mean anything more than that the court may act only if it has personel jurisdiction of a proper custodian and the capacity, within its geographic boundaries, to enforce its orders, physical presence of the petitioner within the district is not an invariable jurisdictional prerequisite. It gives way in the face of other considerations of fairness and strong convenience. It will not be applied to leave one in prison without an effective remedy, to limit the reach and usefulness of related writs authorized by the same statute or to require the dismissal of proceedings once they have been properly begun. It is little more than a precatory direction, as the author of the majority opinion in Ahrens v. Clark explained in Hirota v. MacArthur.

Judge Haynsworth acknowledged that the phrase "within their respective jurisdictions" was inserted into the habeas corpus statute in 1867 in order to prevent, in the vivid example of the day, a District Judge in Florida from being able to call before him a man convicted, sentenced, and incarcerated in Vermont. As Judge Haynsworth points out, however:

> . . . there is nothing in the statute, or in its legislative history, to suggest that the Congress in 1867 thought that if the Vermont prisoner were involuntarily removed to Florida, he would be deprived of his remedy in Vermont and relegated to an inadequate one, without witnesses, in Florida. [406 F.2d at 359-360.]

This counter-example demonstrates that the bounds of habeas corpus jurisdiction cannot be fixed according to a mechanical rule of territorial presence which operates independent of

the relative interests of possible forums or without consideration of the policies which govern the availability of the Great Writ. Rather, as the Supreme Court indicated in Carbo v. United States, 364 U.S. 611, 618 (1961), the proper test for determining whether habeas corpus jurisdiction can be exercised when the petitioner is elsewhere looks to "convenience, necessity and avoidance of inordinant expense."

After rejecting the Ahrens doctrine, the Fourth Circuit went on to analyze all of the factors and interests at stake in Word and concluded that the sentencing state, rather than the state of incarceration, was the proper habeas corpus forum. 406 F.2d at 355-356. In Nelson v. George, U.S. , 90 S. Ct. 1963 (1970), the Supreme Court was asked to rule upon the approach taken in Word. Finding that the petitioner there had failed to exhaust state remedies, the Supreme Court reserved decision on this important issue but indicated that in a subsequent case "the rigor of our Ahrens holding may be reconsidered . . . . " Id. at 1966, n. 5.

In Nelson v. George, id, the Supreme Court also strongly recommended that Congress pass a law for state prisoners similar to 28 U.S.C. § 2255, under which a federal prisoner must petition the court that sentenced him before

he can petition the court where he is incarcerated. */ The burdens placed upon courts and petitioners by the Ahrens rule before it was mitigated by 28 U.S.C. § 2255, see United States v. Hayman, 342 U.S. 205 (1952), illustrate the illogicality of the territorial presence rule. When the situs of the crime, the trial court, the witnesses, the lawyers, and the records are all far removed from the place where the petitioner is imprisoned, the territorial presence rule of Ahrens makes no sense at all. In fact, it seems a fair speculation that in the absence of § 2255, Ahrens would have long ago been rejected in favor of a rule which looks to substantial contacts and a balancing of interests.

Finally, recent cases involving petitions by servicemen for habeas corpus relief support the contention that jurisdiction lies in a district in which petitioner is not present if the forum court has substantial contacts with the case. Donigan v. Laird, - F. Supp. -, 2 SSLR 3542 (D.Md. 1969), held that a serviceman stationed in California could file a writ of habeas corpus in the District Court for Maryland while he was

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*/ 28 U.S.C. § 2241(d), enacted in 1966, confers habeas corpus jurisdiction upon federal courts located near the state court that sentenced the petitioner, as well as upon those located where the petitioner is imprisoned, but applies only to petitioners imprisoned within the sentencing state.

home on leave, rejecting the army's argument that he was not "in custody" within the district as is required by the territorial doctrine of habeas corpus. The court agreed, though, that "for the jurisdiction of a District Court to be complete under 28 U.S.C. sec. 2241, the action must be brought against a proper custodian who is subject to the personal jurisdiction of the court." The Maryland court indicated that the District of Columbia would have been an appropriate place to obtain jurisdiction over the Secretary of Defense and the Secretary of the Army, but allowed the suit before it because the Commander of the First Army at Ft. Meade, Maryland, had sufficient contacts with the case and enough authority over the petitioner to be considered a custodian. Accord, United States ex rel. Lohmeyer v. Laird, - F. Supp. -, 3 SSLR 3072 (D.MD. 1970). Contra, United States ex rel. Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969).

3. The District of Columbia is the Proper Forum for Daniels' Habeas Corpus Petition.

In light of the discussion in the preceding sections, it seems clear that habeas corpus jurisdiction is no longer limited to the federal court which happens to be situated where the petitioning prisoner is located. Further, on the

basis of the facts and circumstances of this case, it is clear that the balance of conveniences weighs heavily in favor of the District of Columbia as the proper forum for Daniels' habeas corpus Petition. Daniels' alleged crime occurred in California, and ordinarily it would be advantageous to have a habeas corpus petition presented near the place of the original trial so that the witnesses at that trial, the lawyers, and the judges will be available to the forum court. In this case, however, three years have passed and in the interim the court-martial which tried Daniels has been disbanded. In fact, since Camp Pendleton is primarily a training camp for Marines en route to Southeast Asia, it is virtually certain that the officers and men involved in the events of July 27, 1967, have all been assigned to new posts. Further, the issues raised by Daniels' Petition are questions of law which can be determined wholly on the basis of the record, without the presence of the petitioner or other witnesses. See 28 U.S.C. § 2243. All records in this care are in the District of Columbia, not in California. Finally, since no one in California had military custody over Daniels when his Petition was filed, it seems clear that there would be no jurisdiction in

California. 28 U.S.C. § 2243; United States ex rel. Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969). */

At the time that his Petition was filed, Daniels was incarcerated in the Naval Prison in Portsmouth, New Hampshire. New Hampshire had no connection with or interest in the issues raised by Daniels' Peitition, however, for the alleged crime and trial occurred elsewhere. New Hampshire was merely the situs of Daniels' prison, and if 28 U.S.C. § 2255 applied, New Hampshire would clearly not be a proper forum. Further, at the time that the Petition was filed, it was certain that Daniels would be released in the very near future. The Court of Military Appeals had reversed Daniels' 18 U.S.C. § 2387 convictions, but had found him guilty of lesser-included offense of soliciting a member of the Marine Corps to commit an offense. The maximum penalty which Daniels could receive for this solicitation offense was four months, and since he had already been in prison for more than two years it was certain that he would soon be released. In the event, Daniels was released on August 20, just seven days after his Petition was filed. In these circumstances it is clear

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*/ The Supreme Court recently granted certiorari in Schlanger v. Seamens, No. 5481 Oct. Term , 1970, to decide whether a District Court has habeas corpus jurisdiction when the petitioner but not his custodian is within the territorial jurisdiction of the court.

that New Hampshire had no actual or continuing interest which could justify the filing of a habeas corpus petition there.

The real jurisdictional base for this habeas corpus petition was and is in the District of Columbia. Appellees Laird and Chafee, who can provide all of the requested relief, officially reside here. Nestor v. Hershey, U.S. App. D.C. , 425 F.2d 504 (D.C. Cir. 1969). All files, transcripts, and papers relating to Daniels' court-martial and appeals are kept in Washington. The crime of which Daniels stands convicted was never mentioned in the course of the proceedings against him until it was uncovered and advanced as a "lesser included offense" by the Court of Military Appeals, which sits in the District of Columbia. Daniels' counsel is present in the District of Columbia. All of the questions raised by Daniels can be adjudicated on the basis of the record in the case, and hence it will not be necessary for Daniels (who now resides in New York City) to attend a hearing on the Petition. 28 U.S.C. § 2243. Finally, the issues presented in Daniels' Petition raise questions concerning the validity of laws regulating freedom of speech in the armed services and other doctrines and policies of general application. This Court has ruled in Nestor v. Hershey,

U.S. App. D.C. , 425 F.2d 504, 522 (1969), that when a complainant raises issues of general significance relating to the conduct of the government, the District of Columbia, as the seat of Government, is an appropriate forum.

In sum, the District of Columbia is the only forum with substantial contacts with, or interests in, this habeas corpus petition. The balance of conveniences weighs heavily in favor of the District of Columbia. Because all other jurisdictional requirements have been met, and because the Ahrens rule has been eroded to the point of practical insignificance, the court below erred in denying Daniels' Petition for a Writ of Habeas Corpus.

C. The District Court Below Has Jurisdiction Over Daniels' Habeas Corpus Petition Even Though He Has Been Released From Prison and Discharged From the Marine Corps Because He Was Incarcerated When the Petition Was Filed and He Continues To Suffer Disabilities and Burdens From His Unconstitutional Conviction

In Parker v. Ellis, 362 U.S. 574 (1960), the Supreme Court had ruled that habeas corpus jurisdiction is extinguished once a petitioner is released from custody. In Carafas v. LaVallee, 391 U.S. 234 (1968), the Court overruled Parker v. Ellis and held that, once habeas corpus jurisdiction has attached, it is not defeated by the expiration of a petitioner's sentence or his release from confinement. While acknowledging that incarceration is a necessary prerequisite for establishing habeas corpus jurisdiction, the Court pointed out that the Habeas Corpus Act "does not limit the relief that may be granted to discharge of the applicant from physical custody" but rather permits a court to grant any appropriate relief. 391 U.S. at 239. In short, the Supreme Court ruled that once habeas corpus jurisdiction has been properly established, it is not lost unless and until all issues raised in the case are mooted.

The rule of Carafas v. LaVallee has been consistently applied to court-martial convictions. Whether a serviceman is released on parole, Harris v. Ciccone, 293 F.Supp. 729 (W.D. Mo. 1968), on bail, Levy v. Parker, 90 S. Ct. 1 (1969) (Douglas J. in chambers), or has the remainder of his sentence expunged by executive clemancy, Brown v. Resor, 407 F.2d 281 (5th Cir. 1969), the courts have held that habeas corpus jurisdiction continues despite the petitioner's release from military custody.

Under Carafas v. LaVallee the test of whether habeas corpus jurisdiction has been extinguished is whether the case has been mooted, and the Supreme Court made it clear that no criminal case is moot so long as any disabilities or burdens continue to flow from the conviction. */ The collateral consequences which flow from a conviction even after the sentence has been served are typified by the fact that in many states ex-criminals cannot engage in certain businesses, are barred from serving as officials of a labor

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*/ A case may also be mooted when the judgement of the court can no longer be carried into effect or where relief is impossible. Note, Mootness on Appeal in the Supreme Court, 83 HARV. L. REV. 1672, 1674, 1677 (1970). In this case the court below has established and retained jurisdiction over Appellees Laird and Chafee, who are empowered to set aside Daniels' conviction, confer the proper rank upon him, and to award him appropriate back pay. It should be noted, though, that Daniels' request for release from custody has been mooted and, with it, the court's jurisdiction over Appellees Commandant and Commanding Officer.

union, and are not permitted to vote, sit on juries, or run for public office. 391 U.S. at 237. The federal government will not even permit them to transport firearms in interstate commerce, 15 U.S.C. § 902(e); United States v. Lee, 428 F.2d 917 (6th Cir. 1970) (applying section 902 (e) to court-martialed servicemen). The crime for which Daniels was convicted was recently raised to the status of a military "felony", see Manual for United States Court-Martial, para. 127c, p. 25-17 (Rev. Ed. 1969), and Daniels' conviction resulted in his receiving a General Discharge rather than the usual Honorable Discharge. With the blot of this improper conviction on his record, Daniels will be substantially disadvantaged in his employment opportunities or in his chances of obtaining security clearance. Finally, the fact that Daniels stands convicted of a crime relating to military discipline and one which purportedly reflects upon his loyalty will seriously damage his personal reputation, for his conviction will be widely regarded as involving moral turpitude.

In sum, the court below continues to have habeas corpus jurisdiction of this case, for that jurisdiction was established while Daniels was incarcerated and the case was not mooted when he was released from custody.

II. THE COURT BELOW IMPROPERLY DENIED DANIELS' COMPLAINT FOR DECLARATORY JUDGEMENT, PERMANENT INJUNCTION, AND MANDAMUS

Daniels filed with the court below, not only a Petition for a writ of Habeas Corpus, but also a Complaint for Declaratory Judgement, Permanent Injunction and Mandamus. On September 2, 1970, the court denied Daniels' Petition without opinion and made no reference to his Complaint. Daniels thereupon moved the court to clarify whether it had intended to dismiss his Complaint when it denied his Petition. On September 22, 1970, the court denied Daniels' Motion for Clarification and Reconsideration without a hearing, without opinion, and without any indication as to whether it intended to dismiss the Complaint. In these circumstances, Daniels is forced to assume that the order of the court below had the effect of dismissing his Complaint. This action was clearly erroneous.

It was uncertain for many years whether a court-martial conviction could be collaterally attacked other than by writ of habeas corpus. All doubts have been removed, however, by recent and definitive decisions which have established that a convicted serviceman who has been released from military custody may seek redress through a civil action seeking

mandamus, a permanent injunction, or a declaratory judgment. Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) (mandamus under 28 U.S.C. § 1361); Gallagher v. Quinn, 124 U.S. App. D.C. 172, 363 F.2d 301 (D.C. Cir. 1966), cert. denied 385 U.S. 881 (1966) (injunction); Kauffman v. Secretary of the Air Force, 135 U.S. App. D.C. 1 , 415 F.2d 991 (D.C. Cir. 1969), cert. denied 396 U.S. 1013 (1970) (declaratory judgment). In fact, when it is doubtful under the circumstances whether the petitioning serviceman is in "custody" within the meaning of 28 U.S.C. § 2241, the District Court is free to treat a habeas corpus petition as a civil complaint for relief in the nature of mandamus under 28 U.S.C. § 1361. Schatten v. United States, 419 F.2d 187, 191 (6th Cir. 1969); United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371, 374 (2nd Cir.), cert. denied 394 U.S. 929 (1969).

In Kauffman this Court specifically stated that "confinement is not a jurisdictional requirement for collateral review of military judgments in civilian courts".*/ 415 F.2d at 994. It further ruled that, in order to carry out the requirement of Burns v. Wilson, 346 U.S. 137, 142 (1953), that a serviceman's constitutional claims be dealt with

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*/ In so holding, the Court indicated that the Supreme Court's ruling in United States v. Augenblick 393 U.S. 348, 351 (1969), constitutes tacit recognition that servicemen not in custody may collaterally attack court-martial convictions. 415 F.2d at 995, n. 5.

"fully and fairly" by military authorities, "military rulings on constitutional issues [must] conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." 415 F.2d at 997. In short, a serviceman may collaterally attack a court-martial conviction whether he is in military custody or not, and the scope and standard of review is the same whether he brings a civil action or seeks habeas corpus.

Under the Ashe, Gallagher, and Kauffman decisions, it is clear that the court below has subject-matter jurisdiction of this action, whether the Complaint filed by Daniels is treated as a civil action seeking a declaratory judgement under 28 U.S.C. § 2201, a civil action seeking injunctive relief under 28 U.S.C. § 1331, or an action in the nature of mandamus under 28 U.S.C. § 1361. The relief which he seeks, consisting of the anulment of his court-martial conviction, restoration to the rank and grade he would have had absent his conviction, and appropriate back pay, can be provided by Appellees Laird and Chafee. Personal jurisdiction was established over both of these Appellees, whom officially reside in the District of Columbia, Nestor v. Hershey, U.S. App. D.C. , 425 F.2d 504, 521 (D.C. Cir. 1969), and under the venue rules of 28 U.S.C. § 1391

(e)(1) and D.C. Code § 11-521, a civil action of this type is properly brought where the defendants reside. */

In sum, regardless of whether the court below erred by denying Daniels Petition for a Writ of Habeas Corpus, it was clearly erroneous for it to dismiss the civil action stated in his Complaint. The court below has personal jurisdiction of Appellees Laird and Chafee, subject-matter jurisdiction of the action, and venue is properly laid in the District of Columbia. This Court should reverse and remand with instructions that the court below entertain Daniels' Complaint for a Declaratory Judgement, Permanent Injunction, and Mandamus.

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*/ Nor can there be any question of misjoinder of claims, for under Federal Rules of Civil Procedure, Rule 18 (a), "a party . . . may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party." When difficulties result from the misjoinder of claims, the correct solution is not dismissal but an appropriate order severing the claims or setting them for separate trials under Rule 21.

CONCLUSION AND PRAYER

For all of the foregoing reasons, Appellant Daniels respectfully prays this Court to reverse and remand this case with instructions directing the court below to hear on the merits Daniels' Petition for a Writ of Habeas Corpus and/or his Complaint for Declaratory Judgement, Permanent Injunction, and Mandamus.

Respectfully submitted,

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ADDENDUM

STATUTES INVOLVED

28 U.S.C.

§ 1331 (a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

§ 1361

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

§ 1391

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

§ 2201

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2243

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to

impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack the court shall vacate and set the judgement aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

D.C. Code:

§ 11-521

(a) Except in actions or proceedings over which exclusive jurisdiction is conferred by law upon other courts in the District, the United States District Court for the District of Columbia, in addition to its jurisdiction as a United States district court and to any other jurisdiction conferred by law, has all the jurisdiction possessed and exercised by it on January 1, 1964, and has original jurisdiction of all:

(1) civil actions between parties, where either or both of them are resident or found within the District; and

(2) offenses committed within the District.

(b) Except as otherwise specially provided, an action may not be brought in the District Court by original process against a person who is not resident or found within the District

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,766

GEORGE DANIELS, APPELLANT

v.

MELVIN R. LAIRD, Secretary of Defense, *et al.*, APPELLEES

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
HARVEY S. PRICE,
JOHN S. RANSOM,
Assistant United States Attorneys.

H.C. No. 140-70

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellees, the following issues are presented:

1. Whether the District Court properly dismissed appellant's petition for a writ of habeas corpus when it appeared from the pleadings that appellant was not in custody in the District of Columbia.

2. Whether the District Court properly dismissed appellant's complaint for declaratory judgment, permanent injunction and mandamus.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,766

GEORGE DANIELS, APPELLANT

v.

MELVIN R. LAIRD, Secretary of Defense, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

Appellant appeals from a dismissal of his petition for writ of habeas corpus and other relief.[1] Appellant's peti-

[1] Appellant's complaint, listing as defendants Melvin R. Laird, Secretary of Defense; John H. Chafee, Secretary of the Department of the Navy; Commandant, First Naval District, Boston, Massachusetts; and Commanding Officer, United States Naval Disciplinary Command, Portsmouth, New Hampshire, was denominated a petition for writ of habeas corpus, complaint for declaratory judgment, permanent injunction, and mandamus.

Appellant's complaint requested (1) the issuance of a writ of habeas corpus; (2) "[a] declaration that the general court martial conviction and sentence . . . are void"; (3) the release of appellant from incarceration; (4) an order directing appellees to vacate and annul the conviction and sentence of appellant and to correct

tion was filed in the District Court on August 13, 1970. At that time appellant was in custody in the Navy Disciplinary Barracks at Portsmouth, New Hampshire, as a result of a general court-martial conviction. On September 2, 1970, the Honorable Howard F. Corcoran dismissed appellant's petition. On September 10 appellant filed a motion for clarification and reconsideration, which was denied by Judge Corcoran on September 22. This appeal followed.

Appellant was convicted by a general court-martial on December 7, 1967, at Camp Pendleton, California. At that time appellant was a member of the United States Marine Corps and assigned to Camp Pendleton preparatory to duty in Vietnam. Appellant was convicted of eight specifications laid under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934,[2] which alleged that appellant, with intent to interfere with, impair and influence the loyalty, morale, and discipline of named members of the United States Marine Corps, advised, counselled, urged, caused and attempted to cause insubordination, disloyalty, and refusal of duty on the part of the said members contrary to 18 U.S.C. § 2387 (a).[3] The specifi-

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his military records; (5) an order to appellees to restore appellant to full rank and seniority from the date of his court-martial; (6) an order directing appellees to restore appellant's back pay allowance and any other payments to which he might be entitled; and (7) such other relief as might be proper.

[2] 10 U.S.C. § 934 provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

[3] 18 U.S.C. § 2387 (a) states:

> (a) Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:

[Footnote continued on page 3]

cations further alleged that appellant's activities occurred variously between April 28 and August 10, 1967, and included statements allegedly made by appellant to various named individuals that they should inform the company commander that they would not go to Vietnam nor fight in the Vietnam war.[4]

Appellant was sentenced originally to a dishonorable discharge, forfeiture of all pay and allowances, reduction in rank, and confinement at hard labor for ten years. Thereafter, on May 15, 1969, the Navy Board of Review affirmed the conviction but reduced the period of confinement to four years. On July 10, 1970, the United States Court of Military Appeals reversed appellant's conviction on all specifications and affirmed a conviction of the lesser included offense of soliciting a member of the Marine Corps to commit the offense of refusing to perform a military obligation. The reversal of the conviction was based on the failure of the law officer at the general court-martial to instruct the members of the court-martial that appellant's statements must have had a tendency under the circumstances to cause insubordination, disloyalty, or refusal of duty.[5] On August 18, 1970, the

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[3] [Continued]

> (1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
>
> (2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

[4] A copy of the specifications is contained in Appellant's Record Appendix at R 12 through R 15.

[5] The opinion of the Court of Military Appeals is reported as *United States* v. *Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970).

Court of Military Review affirmed a four-month period of incarceration, which had been served by appellant.[6] Appellant was released from custody at Portsmouth, New Hampshire, on August 20, 1970, and given a general discharge.

ARGUMENT

I. The District Court properly dismissed appellant's petition for a writ of habeas corpus.

Appellant contends that the District Court improperly dismissed his petition for a writ of habeas corpus. Since the facts as alleged by appellant in his petition establish that he was not convicted of an offense in the District of Columbia, was not sentenced for an offense in the District of Columbia, was never detained in the District of Columbia, and at the time he applied for a writ of habeas corpus was not physically present in the District of Columbia, we maintain that the District Court's dismissal was not only proper but required.

Appellant's petition was denied by the District Court since he was not in custody within this jurisdiction at the time the petition was filed.[7] The law is quite clear

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[6] Appellant's custody at Portsmouth, New Hampshire, was considered as temporary custody pending appellate review. On August 28, 1969, his service of sentence to confinement and forfeitures was deferred, and appellant was transferred to Service Battalion, Marine Corps Base, Quantico, Virginia. His deferral was thereafter rescinded by the officer at Quantico exercising general court-martial jurisdiction because of unauthorized absences and, allegedly, morale deterioration at the base directly linked to appellant. *United States* v. *Daniels*, 19 U.S.C.M.A. 518, 519-520, 42 C.M.R. 120, 121-122 (1970).

[7] Although appellant was released from custody and discharged from the military service after the instant petition was filed, we do not contend that appellant was not "in custody" for purposes of compliance with 28 U.S.C. § 2241 or that the habeas corpus petition is moot. *See Carafas* v. *LaVallee*, 391 U.S. 234 (1968). We emphasize, however, that appellant was never in custody *in the District of Columbia*. We also note that appellant is now allegedly a resident of New York (Brief for Appellant, p. 22).

that "the jurisdiction of the District Court to issue the writ [of habeas corpus] . . . is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court [when the petition is filed]." *Ahrens* v. *Clark*, 335 U.S. 188, 192 (1948). In *Ahrens* the Court unequivocally ruled that the phrase "within their respective jurisdictions" [8] prevented the United States District Court for the District of Columbia from issuing a writ of habeas corpus upon a petition filed by German nationals being held for deportation on Ellis Island, New York. The Supreme Court has not thereafter overruled or modified that decision in any way which would embrace appellant's position.[9] Rather, *Ahrens* v. *Clark* has continually and consistently been adhered to by the vast majority of judicial circuits.[10]

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[8] 28 U.S.C. § 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*. The order of a circuit judge shall be entered in the records of the district court of the district *wherein the restraint complained of is had*.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination *to the district court having jurisdiction to entertain it*. (Emphasis added).

[9] The concept of "jurisdiction" has been expanded by the Supreme Court to include, for purposes of writs of habeas corpus *ad subjiciendum*, only those areas, such as foreign countries, where no District Court is situated. *See, e.g., United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); *Burns* v. *Wilson*, 346 U.S. 137 (1953); *Hirota* v. *MacArthur*, 338 U.S. 197 (1948).

[10] *See, e.g., Ginyard* v. *Clemmer*, 123 U.S. App. D.C. 100, 357 F.2d 291 (1966); *McAffee* v. *Clemmer*, 84 U.S. App. D.C. 57, 171 F.2d 131 (1948), *cert. denied*, 337 U.S. 932 (1949); *United States ex rel. Van Scoten* v. *Pennsylvania*, 404 F.2d 767 (3d Cir. 1968); *Ashley* v. *Washington*, 394 F.2d 125 (9th Cir. 1968); *Booker* v. *Arkansas*, 380 F.2d 240 (8th Cir. 1967); *Duncan* v. *Maine*, 295 F.2d 528 (1st Cir. 1961); *Allen* v. *United States*, 327 F.2d 58 (5th Cir. 1964); *Hart* v. *Ohio Bureau of Probation & Parole*, 290 F.2d 550 (6th Cir. 1961). *Contra, United States ex rel. Meadows* v. *New York*, 426 F.2d 1176 (2d Cir. 1970); *Word* v. *North Carolina*, 406 F.2d 352 (4th Cir. 1969) (*en banc*). Recently the Supreme Court in *Nelson* v. *George*, 399 U.S. 224 (1970), affirmed the judgment of a

Appellant principally relies on *Word* v. *North Carolina*, 406 F.2d 352 (4th Cir. 1969) (*en banc*), to support his contention that there has been an erosion of the Supreme Court's opinion in *Ahrens* v. *Clark*, *supra*, and that *Ahrens'* doctrine limiting jurisdiction to the place in which the petitioner is confined is no longer valid. *Word*, however, is clearly inapposite. In *Word* the petitioner for a writ of habeas corpus was confined in Virginia serving a state sentence. North Carolina had filed a detainer with the prison officials in Virginia, which was based on a state conviction in North Carolina. The petitioner sought relief in the District Court in North Carolina which maintained jurisdiction over the court in which he had been convicted and sentenced. The court, in an opinion by Chief Judge Haynsworth, held that the District Court for the district in which the petitioner was convicted and sentenced could assert jurisdiction over the petition, basing its holding primarily on the lack of an available collateral remedy comparable to 28 U.S.C. § 2255:

> Should we hold that the writ must be sought in the district of confinement we would be met with all of the practical problems and difficulties which § 2255 solved or avoided with respect to postconviction review of federal sentences, save only the problem of concentration of cases in districts in which federal penal institutions are located. *Word* v. *North Carolina*, *supra*, 406 F.2d at 356.

The decision in *Word* is clearly limited to a single exception to the general rules; *i.e.*, it permits only a single

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Court of Appeals, *George* v. *Nelson*, 410 F.2d 1179 (9th Cir. 1969), remanding a case to the District Court to permit the petitioner to exhaust his remedies within the state prior to proceeding in the Federal District Court for a writ of habeas corpus. The issue was similar to that presented in *Word* v. *North Carolina*, *supra*, which the Court cited, in that the petitioner was challenging the basis of a detainer lodged by another state in the state in which he was confined. The court noted the unavailability of a remedy similar to the federal remedy under 28 U.S.C. § 2255 to launch an attack in the sentencing court rather than the court of the state of incarceration.

District Court in the detainer-issuing state to exercise jurisdiction. The court in effect created for state prisoners a new avenue of collateral attack roughly parallel to that already available to federal prisoners under 28 U.S.C. § 2255. It is not contended, nor can it be, that *Word* purports to extend jurisdiction to any other District Court. A logical extension of appellant's argument assertedly founded on *Word* would permit one detained to select any forum which he feels would be most amenable to his cause. *Word* does not so hold, nor does it even remotely suggest such a concept. Moreover, *Word* was limited to providing a remedy for those state prisoners who were subject to future detention in another state as a result of their convictions in the latter state. Technically, the requirement of custody in the state in which the writ is sought was not abandoned, since the demanding state, by the use of a detainer, prohibits the release of the prisoner from the state of incarceration except into the custody of the demanding state. The instant case is in no wise similar, since appellant is not and has never been subject to future restraint in the District of Columbia.

Appellant additionally relies on two cases involving servicemen challenging military orders to illustrate the non-necessity of being in custody in the jurisdiction where the writ of habeas corpus is sought. *United States ex rel. Lohmeyer* v. *Laird*, 318 F. Supp. 94 (D. Md. 1970); *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969). Both cases, however, are distinguishable from the instant case. In the first place, both cases involved applications for writs by individuals residing within the district in which the writ was sought. Such is not the case here. In the second place, in each case the court found that the petitioner was in custody within its jurisdiction, and a proper custodian was also located there.[11] Thus both *Lohmeyer*

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[11] Additionally, in *Lohmeyer* the court predicated the presence of the Secretary of Defense within its jurisdiction on 28 U.S.C. § 1391 (e) (4). This appears to be a tortuous use of that provision when applied to a writ of habeas corpus. Although habeas corpus proceedings are said to be civil in nature, the Supreme Court has

and *Donigian* presented a basis for jurisdiction lacking in the case at bar.[12]

Appellant strives to establish that the District of Columbia is the proper forum for his habeas corpus petition by stressing that none of the persons appearing at his court-martial in California are now available at that site, that all the records pertaining to the case are located in the District of Columbia, and that no one in California had "custody" of him at the time the writ was sought. This argument presumes to establish jurisdiction by means other than that prescribed by Congress and judicial precedent. *Nestor* v. *Hershey*, 138 U.S. App. D.C. 73, 425 F.2d 504 (1969), on which appellant relies, is of no help to him on its facts, and in any event this Court in *Nestor* limited its exercise of jurisdiction to the particular circumstances of that case:

> Where the role of the Director [Hershey] is not so immediate and direct as it is in the instant case, our District Court may properly determine that the controversy has no strong ties to this jurisdiction and, invoking the principle of *forum non conveniens* embodied in 28 U.S.C. § 1404 (a) (1964), transfer the action to a more appropriate forum. *Id.* at 91, 425 F.2d at 522.

Since the roles of the Secretary of Defense and the Secretary of the Navy were not productive of appellant's conviction, specifically not in the manner that Director Hershey exercised control over the Selective Service, *Nestor*

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stated that such an appellation is "gross and inexact" since "the proceeding is unique." *Harris* v. *Nelson*, 394 U.S. 286, 293-294 (1969). Additionally, the authorization for District Courts to grant writs of habeas corpus "within their respective jurisdictions," 28 U.S.C. § 2241 (a), would appear to fall within the statutory exception ("except as otherwise provided by law") stated in 28 U.S.C. § 1391 (e).

[12] *See, e.g., Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970); *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969); *Morales Crespo* v. *Perrin*, 309 F. Supp. 203 (D.P.R. 1970); *Weber* v. *Clifford*, 289 F. Supp. 960 (D. Md. 1968).

would not appear to establish any precedent requiring that appellant's petition be entertained here.

Appellant at the time he filed his petition was in custody in New Hampshire. Only a federal District Court in New Hampshire, and no other, had jurisdiction to entertain his petition for a writ of habeas corpus. Clearly the District Court properly dismissed appellant's petition for a writ of habeas corpus, and that determination should now be affirmed.

II. The District Court properly dismissed appellant's complaint for declaratory judgment, permanent injunction, and mandamus.

We do not dispute appellant's thesis that a court-martial conviction under special circumstances may be collaterally attacked by means other than a writ of habeas corpus. *See, e.g., Gallagher* v. *Quinn*, 124 U.S. App. D.C. 172, 363 F.2d 301, *cert. denied*, 385 U.S. 881 (1966). However, as appellant recognizes, an extraordinary remedy in the nature of declaratory judgment, permanent injunction or mandamus is appropriate only for a "convicted serviceman who has been released from military custody." [13] The Supreme Court has stated that where special statutory proceedings have been provided, declaratory relief should not be granted in lieu of the appropriate remedy.[14] *Katzenbach* v. *McClung*, 379 U.S. 294, 296 (1964). Since appellant was not released from custody at the time he filed the instant petition, it would appear that his sole available remedy among the remedies he sought was habeas corpus, which for the reasons stated in Argument I, *supra*, was available only in New Hampshire.

The rule proscribing the remedies sought by appellant for one in his particular circumstances has been clearly stated by this Court:

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[13] Brief for Appellant, p. 27.

[14] While we shall speak in terms of the unavailability of a declaratory judgment where other relief is appropriate, our argument also applies to injunctive relief and mandamus.

> The action for declaratory judgment is not suitable and does not lie in the District of Columbia in such cases as a substitute for a motion to vacate or to correct the sentence in the court where it was imposed, or *as a substitute for habeas corpus in the district where the unlawful detention occurs*, or as a substitute for a new trial or appeal. Unless so restricted there would be no end to that kind of litigation. To hold otherwise would mean that all such actions for declaratory judgment could be brought only in the District of Columbia because this is the only district in which the Attorney General may be sued. *Clarke* v. *Memolo*, 85 U.S. App. D.C. 65, 68, 174 F.2d 978, 981 (1949) (emphasis added).

While the basis, in part, for the ruling in *Memolo* has been eroded by the enactment of 28 U.S.C. § 1391 (e), the principal tenet, the prohibition against substituting other remedies for habeas corpus remains valid, not only in this jurisdiction but in others.[15]

Appellant further proclaims that relief is available in the District of Columbia pursuant to 28 U.S.C. 1391 (e) and 11 D.C. Code § 521. Neither statute, however, vests jurisdiction in the District Court here when another remedy is available, in this case a writ of habeas corpus in the jurisdiction of confinement. Even assuming that either statute could establish jurisdiction here, this Court has explicitly expressed its reluctance to entertain such actions by denying relief to federal prisoners who were "not confined in the District of Columbia, not sentenced in the District of Columbia, and seeking resolution of issues in no way related to this jurisdiction." *Young* v. *Director, United States Bureau of Prisons*, 125 U.S. App. D.C. 105,

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[15] *See, e.g., Sobell* v. *Attorney General*, 400 F.2d 986, 990-991 (3d Cir.), *cert. denied*, 393 U.S. 940 (1968) (Freedman, J., concurring in part and dissenting in part); *Gajewski* v. *United States*, 368 F.2d 533 (8th Cir. 1966), *cert. denied*, 386 U.S. 913 (1967); *Coronado* v. *United States*, 341 F.2d 918 (5th Cir. 1965); *Forsythe* v. *Ohio*, 333 F.2d 678 (6th Cir. 1964); *Hurley* v. *Lindsay*, 207 F.2d 410 (4th Cir. 1953); *Mowers* v. *United States Attorney General*, 297 F. Supp. 535 (S.D.N.Y. 1969); *Valenti* v. *Clark*, 83 F. Supp. 167 (D.D.C. 1949) (Holtzoff, J.).

106, 367 F.2d 331, 332 (1966). Appellant's arguments, carried to their logical conclusion, would permit any similar suit to be filed in any jurisdiction in the United States. Clearly that position is untenable. Appellant's petition and complaint should be dismissed without prejudice to permit its filing in a proper jurisdiction.

CONCLUSION

WHEREFORE, it is respectfully submitted that the dismissal of the petition and complaint by the District Court should be affirmed.[16]

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[16] If this Court should determine that dismissal of appellant's petition would vitiate an existing remedy, this case could be remanded with instructions to transfer the cause to a proper forum pursuant to 28 U.S.C. § 1404 (a) in order that appellant might not lose his right to pursue his remedy by habeas corpus, and additionally to provide for the use of existing pleadings.

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REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,766

GEORGE DANIELS,

Petitioner-Appellant,

v.

MELVIN R. LAIRD, et al.,

Respondents-Appellees

On Appeal from the United States District Court
for the District of Columbia

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IN THE

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REPLY BRIEF FOR APPELLANT

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1. The Territorial Doctrine of Ahrens v. Clark Does Not Bar Daniels' Habeas Corpus Petition

The Government argues that Appellant Daniels must be denied relief in this Court because he might have sought a writ of habeas corpus in New Hampshire. The Government does not deny, however, that when Daniels filed his Petition it was certain that he would be released soon, and in fact Daniels was out of prison and out of New Hampshire by the time the court below acted.

The Government points to no meaningful contact with, or interest in, this case which might be claimed by New Hampshire, nor does it deny that the District of Columbia is the only jurisdiction which has significant contacts with this case. The Government has contended itself with citing cases in which the Ahrens decision has been applied mechanically; it has wholly failed to offer this Court any considerations in reason or policy why the outmoded and moribund territorial presence rule should be applied in the present case.

Recent well-considered judicial decisions have recognized that time has eroded the vitality of Ahrens. Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969); United States ex rel. Lohmeyer v. Laird, 318 F. Supp. 94 (D. Md. 1970); Donigian v. Laird, 308 F. Supp. 449 (D. Md. 1970); United States ex rel. Armstrong v. Wheeler, ____ F. Supp. ____, 3 SSLR 3553 (E.D. Pa. 1971). A cursory examination of Chief Judge Haynesworth's opinion makes it abundently clear that Word did not involve a narrow and technical exception to the Ahrens doctrine (but see Government's Brief, pp. 10-11),[1/] but rather a fundamental rethinking of the jurisdictional basis for habeas corpus. The teaching of Word is that habeas corpus jurisdiction properly lies with that forum which has the most significant contacts with a case.

Contrary to the Government's assertion, no "logical extension" of the jurisdictional theory of Word would permit a prisoner to "select any forum which he feels to be amenable to his cause." (Government Brief, p. 11.) A petitioner should

1/ All citations are to the typescript version of the Government's brief.

be required to select a forum which has significant contacts with his case, but clearly he should not be relegated to a wholly irrelevant and inappropriate forum, such as New Hampshire in the present case.

Daniels' has already delineated the factors which make the District of Columbia, not New Hampshire or California, the only forum with any significant and continuing contact with, and interest in, this case.[2/] Additionally, the nature and scope of the issues raised by Daniels makes the District of Columbia, as the seat of the Federal government, the appropriate forum. Nestor v. Hershey, ____ U.S. App. D.C. _____, 425 F.2d 504, 521-522 (D.C. Cir. 1969). Venue clearly lies in the District of Columbia, 28 U.S.C. § 1391(e), and, as the Government appears to concede,[3/] if the District of Columbia is not the most convenient forum for this or any similar case, the proper course is not to dismiss but to transfer under 28 U.S.C. § 1404(a). See id., 425 F.2d at 522 and n. 23.

2/ Opening Brief, pp. 19-23.

3/ Government Brief, p. 15, n. 16. Significantly, the Government has also conceded that, under Carafas v. LaVallee, 391 U.S. 234 (1968), Daniels' release from prison and discharge from military service did not moot his habeas corpus action. Id., at p. 9, n. 7.

2. The District Court Had Jurisdiction of Daniels' Complaint for Declaratory Judgment, Permanent Injunction, and Mandamus

The Government contends that the court below properly dismissed Daniels' Complaint for Declaratory Judgment, Permanent Injunction, and Mandamus because Daniels was incarcerated at the time and hence his sole remedy was by writ of habeas corpus. This position is inconsistent with both the facts of this case and with the applicable rules of law.

Daniels filed his Complaint for collateral relief on August I3, 1970; on August 20, 1970, he was released from custody; and on September 2, 1970, the District Court dismissed his Complaint. Thus, at the time that the court below acted, Daniels had been released from custody and discharged from military service. It is difficult to understand how the Government can apparently concede that collateral relief of the sort Daniels sought is available to convicted servicemen who have been released (Government Brief, p. 13), and yet contend that the court below properly dismissed the Complaint. It would certainly seem unnecessarily artificial and technical to say that a complaint which would admittedly have been good if filed one week later, is bad when filed, at least where, as here, the week's delay in no way affects the merits of the claim.

In short, although facts existing at the time of the filing of a complaint are highly relevant, a court should also take account of important facts which develop between the time of filing and the time at which it acts.

In any event, the Government's contention that because Daniels might have sought habeas corpus in New Hampshire he could not have sought alternative collateral relief in the District of Columbia files in the face of established law. [4/] In a case involving an army reservist who opposed being called to active duty, Judge Friendly recently stated that: "Whether or not habeas corpus is available, the district court was free to treat the petition as one for mandamus . . . ." United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969) (emphasis added). Accord, Smith v. Resor, 406 F.2d 141, 147 (2d Cir. 1969); Schatten v. United States, 419 F.2d 187, 191 (6th Cir. 1969); cf. Walker v. Blackwell,

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4 / The Government's reliance upon Katzenback v. McClung, 379 U.S. 294 (1964), for the proposition that Daniels could not seek declaratory relief when habeas corpus was available, cannot withstand scrutiny. In McClung the Court referred to the admonition of F.R. Civ. P. 57 that, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate," but noted the qualification in the Notes of Advisory Committee on Rules. Those Notes state that when special statutory proceedings have been established, such as those under Title II of the Civil Rights Act of 1964 which were involved in McClung, federal courts should usually decline declaratory relief. The Notes stress, however, that "general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings." For Rule 57 purposes, habeas corpus is clearly a general extraordinary remedy regulated by statute rather than a special statutory proceeding.

360 F.2d 66, 67 (5th Cir. 1966).

In Hurley v. Reed, 110 U.S. App. D.C. 32, 288 F.2d 844 (D.C. Cir. 1961), this Court, through Mr. Justice Reed, specificially held that collateral relief by way of declaratory judgment may be brought to test the validity of a parole revocation even if the revocation could be tested by way of habeas corpus in the district of confinement:

> To test whether the Parole Board's action in revoking the parole and reimprisoning appellant conformed to the requirement of [18 U.S.C. § 4207], appellant chose the procedure of declaratory judgment. This was done although he might have proceeded by habeas corpus in the Middle District of Pennsylvania where he was and is confined. Does the possibility of the use of the prerogative writ of habeas corpus bar appellant from the use of the declaratory judgment? We think not.
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> * * * * * * * * *
>
> The language and history of Rule 57 of the Federal Rules of Civil Procedure . . . indicate that the existence of another adequate remedy, habeas corpus, is not a reason for refusing to allow the declaratory judgment procedure.
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> * * * * * * * * * * *
>
> No question is, or could properly be, raised as to the jurisdiction of the courts of the District of Columbia over declaratory judgments in general.
>
> * * * * * * * * * *
>
> The appellant here had, we think, originally two methods of approach -- by habeas corpus where he was confined, or by declaratory judgment in the District of Columbia. [288 F.2d at 847-849.]

Accord, Washington v. Hagan, 287 F.2d 332 (3rd Cir. 1960); cf. Robbins v. Reed, 106 U.S. App. D.C. 51, 269 F.2d 242 (D.C. Cir. 1959). These decisions reflect the more flexible approach adopted by the Supreme Court under which persons ordered deported or excluded under the Immigration and Nationality Act of 1952 may challenge such orders either by way of habeas corpus or declaratory judgment. Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); Brownell v. We Shung, 352 U.S. 180 (1956).

In We Shung, supra, the petitioner argued, and the Court agreed, that when the scope of review and the governing substantive law are the same, artificial limitations should not be placed upon the form of action which is employed. 352 U.S. at 182-184, 186. In this connection, Kauffman v. Secretary of the Air Force, 135 U.S. App. D.C. 1, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970), a case never cited by the Government, takes on added significance. In Kauffman this Court ruled that when a serviceman collaterally attacks a court-martial conviction, the scope and standard of review are identical whether the serviceman is in custody or not and whether the relief sought is habeas corpus or some other appropriate remedy.

Under Kauffman it is clearly immaterial whether a serviceman is incarcerated when he files his complaint seeking collateral relief, provided ordinary jurisdictional requirements

are met, for the merits of his claim will not be affected by whether he is in custody, and the remedies available are the same. In short, this Court's Hurley rule -- which extends alternative collateral remedies to persons even though they could seek habeas corpus elsewhere -- seems fully applicable to court-martialed servicemen.

Nor can there be any doubt that venue is properly laid in the District of Columbia in light of 28 U.S.C. § 1391(e).[5/] In fact, the liberal venue rules established by that provision[6/] for suits against federal officers points up the obvious solution to a problem alluded to by the Government. (Brief, pp. 14-15.) If suits similar to Daniels' were filed

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5/ The Government admits that section 1391(e) largely undercuts its reliance on Clark v. Memolo, 85 U.S. App. D.C. 65, 174 F.2d 978 (D.C. Cir. 1949). (Government's Brief, p. 14.) That case is clearly inapposite in any event, for it involved a Pennsylvania resident incarcerated in Pennsylvania who had been twice convicted by Pennsylvania federal courts of committing Pennsylvania crimes but who sought a declaratory judgment against the Attorney General in the District of Columbia rather than attacking the validity of his conviction in the Pennsylvania federal courts under 18 U.S.C. § 2255. This Court's refusal to exercise jurisdiction was clearly necessary to effectuate the purpose of section 2255.

6/ Leading authorities have concluded that section 1391(e) did not merely expand the venue of district courts to hear suits against federal officers, but actually added to their jurisdiction to do so. Liberation News Service v. Eastland, 426 F.2d 1379, 1389 (2d Cir. 1970); United States ex rel. Lohmeyer v. Laird, 318 F. Supp. 94, 98-99 (D. Md. 1970); Metz v. United States, 304 F. Supp. 207, 209 (W.D. Pa. 1969); 2 Moore's Federal Practice ¶ 4.29, pp. 1210-1211 (1964).

in circumstances indicating that another forum would be more convenient, the question raised is one of venue rather than jurisdiction, and in appropriate circumstances such cases can be transferred under 28 U.S.C. § 1404(a). See, Young v. Director, U.S. Bureau of Prisons, 125 U.S. App. D.C. 105, 367 F.2d 331 (D.C. Cir. 1966). In the present case, as has been previously shown, there is no other appropriate forum. (Opening Brief, pp. 19-23.)

CONCLUSION

Appellant Daniels is entitled to seek habeas corpus relief below even though he was incarcerated elsewhere when he filed his Petition, for Ahrens v. Clark does not have continuing precedential value and the District of Columbia is the only forum that has significant contacts with this case.

Appellant Daniels is further entitled to seek other collateral relief below, for he was not incarcerated when the court below acted on his Complaint and, in any event, under Hurley and Kauffman, such collateral relief is alternatively available in the District of Columbia even though habeas corpus might have been available in another district.

Respectfully submitted,

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